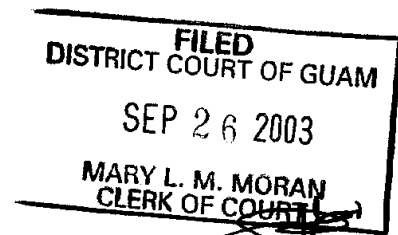


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7
8 IN THE DISTRICT COURT OF GUAM

9 GOLAM R. SARKER,

CIVIL CASE NO. 02-00023

10 Plaintiff,

11 vs.

12 **MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS**

13 HYATT REGENCY GUAM, MIHIR ROUT, and
DOE OFFICERS 1 through 10,

14 Defendants.

15 Defendants, HYATT REGENCY GUAM and MIHIR ROUT, hereby submit this
16 memorandum of points and authorities in support of its motion to dismiss the complaint filed by
17 Plaintiff, GOLAM R. SARKER ("Plaintiff") pursuant to Federal Rule of Civil Procedure ("F.R.C.P")
18 41(b).

19 **I. INTRODUCTION**

20 On August 7, 2002, Plaintiff filed a complaint for damages alleging employment
21 discrimination by the Defendants. Since the issuance of the December 17, 2002 Scheduling Order,
22 Plaintiff has done nothing to advance this action other than resetting discovery deadlines through
23 Plaintiff's former counsel.

24 On August 28, 2003, Plaintiff's counsel moved to withdraw as counsel for the Plaintiff
25 because "[a]ll efforts to contact [his] client have proven fruitless and [his] client has not met his
26 obligations to meet and confer with counsel." See Plaintiff's Counsel's Motion to Withdraw filed
27 August 28, 2003, p. 2. Plaintiff's counsel's motion to withdraw was granted on September 5, 2003.
28 See Order dated September 5, 2003 granting motion to withdraw. Based on Plaintiff's lack of interest

1 in pursuing this case, as evidenced by his failure to maintain any contact whatsoever with his attorney,
2 Plaintiff's claims should be dismissed with prejudice pursuant to Rule 41(b).

3 **II. STANDARD FOR DISMISSAL**

4 Rule 41(b) permits the court to dismiss an action for failure to prosecute or to comply
5 with a court order in order to prevent undue delays in the disposition of pending cases and to avoid
6 congestion in the calendars of the courts. *Link v. Wasbash R. Co.*, 370 U.S. 626, 629-630 (1962). An
7 involuntary dismissal under Rule 41(b) for a plaintiff's failure to prosecute is a matter committed to
8 the discretion of the district court. *Id.* at 633. A dismissal for failure to prosecute under Rule 41(b)
9 is based on the record as a whole and on the totality of the circumstances confronting the court.
10 *Citizens Utilities Co. v. American Tel. and Tel. Co.*, 1977 WL 1551 (N.D. Cal. 1977)(court has
11 discretion to dismiss where the totality of the circumstances warrant such action)¹; *McCune v. F. Alioto*
12 *Fish Co.*, 597 F.2d 1244, 1249 (9th Cir. 1979)(court looks to whole record to support Rule 41(b)
13 dismissal).

14 **III. PLAINTIFF HAS FAILED TO PROSECUTE HIS CLAIM**

15 Failure to prosecute, although not defined by the Rule, may manifest itself through
16 simple inaction. *Boiling v. U.S.*, 231 F.2d 926, 927 (9th Cir. 1956)(trial court has inherent power to
17 dismiss case based on plaintiff's inaction).

18 The failure of a plaintiff to contact his attorney will in some instances constitute
19 sufficient grounds for dismissal based on Rule 41(b). *Barahman v. Sullivan*, 1992 WL 226293
20 (E.D.N.Y.).² In *Barahman*, the court dismissed an action under Rule 41(b) after plaintiff's attorney
21 was unable to locate plaintiff after numerous attempts. *Id.*

22 In the instant case, Plaintiff's contact with his attorney has been sporadic at best. For
23 example, Plaintiff did not retrieve the Scheduling Order in this matter, which was filed in December
24 2002, until July 1, 2003. Plaintiff's Counsel's Motion to Withdraw, p. 2. At that time, Plaintiff was
25 advised that he needed to maintain strict disclosure to his counsel of his contact information and to
26

27 ¹See attachment pursuant to GR 4.1 Local Rules of Practice.

28 ²*Id.*

1 meet with his counsel regarding approaching deadlines. *Id.* Nevertheless, Plaintiff still failed to
2 maintain contact with his attorney. *Id.* Plaintiff's attorney has indicated that he has made numerous
3 attempts to contact the Plaintiff and that all such efforts have "proven fruitless." *Id.* Furthermore, on
4 August 8, 2003, and again on August 11, 2003, Plaintiff's Counsel's staff attempted unsuccessfully
5 to contact Plaintiff through all contacted numbers listed in Plaintiff's file. *See generally*, Declaration
6 of Gabriela P.R. Rippel.

7 Plaintiff's failure to maintain contact with his attorney has prejudiced Defendants. On
8 numerous occasions, the parties have had to jointly request enlargements of time for motions and
9 discovery due to Plaintiff's inability to maintain contact with his attorney. *See* Stipulation to Enlarge
10 Time for Discovery and Motions dated July 7, 2003 and August 14, 2003. Moreover, Plaintiff failed
11 to provide Initial Disclosures to Defendants as required by the December 17, 2002 Scheduling Order
12 and Discovery Plan, and as required under Rule 26(a)(1) of the Federal Rule of Civil Procedure. *See*
13 Declaration of Michael A. Pangelinan, ¶ 2. In addition, Defendants have attempted several times to
14 schedule Plaintiff's deposition; however, because Plaintiff's counsel was unable to contact Plaintiff,
15 Defendants have not been able to depose Plaintiff. *See* letters to Plaintiff's counsel attached as
16 **Exhibits "A and B"** to the Declaration of Michael A. Pangelinan. With the discovery completion
17 deadline having now passed, with the motion deadlines quickly approaching, and with trial scheduled
18 to commence on November 4, 2003, Defendants are now in the vulnerable position of having to
19 prepare for trial without the benefit of discovery and without knowing whether a trial will actually take
20 place.

21 The facts of the present matter, as in *Barahman*, strongly indicate that Mr. Sarker has
22 not only failed to prosecute his claim, but has apparently abandoned his case altogether. It is clear from
23 Plaintiff's actions that he has no interest in moving his claim forward. Plaintiff's former counsel has
24 indicated that he is aware of evidence that contradicts the assertions made by Plaintiff regarding the
25 merits of Plaintiff's claim. *See* Plaintiff's Counsel's Motion to Withdraw, p. 2. In fact, as part of his
26 argument in support of withdrawal, Plaintiff's former counsel cites MRPC Rule 3.1 which prohibits
27 a lawyer from bringing a claim that lacks merit. *Id.* at p. 3.

28 As in *Barahman*, Plaintiff's counsel has made every attempt to contact his client to no


1 avail. Plaintiff's Counsel has withdrawn from this case leaving Defendants to face the prospect of
2 preparing for a trial that will most likely never occur. Defendants have already incurred substantial
3 legal fees in having to respond to Plaintiff's baseless allegations. In fairness to Defendants, this case
4 should be dismissed with prejudice pursuant to Rule 41(b).

5 **IV. CONCLUSION**

6 For the foregoing reasons, Defendants respectfully request that its motion be granted
7 and that Plaintiff's Complaint be dismissed with prejudice.

8 DATED this 26th day of September, 2003.

9
10 CALVO AND CLARK, LLP
Attorneys At Law

11
12 By: 
13 **MICHAEL A. PANGELINAN**
14 Attorneys for Defendants Hyatt Regency
Guam and Mihir Rout

Not Reported in F.Supp.
1978-1 Trade Cases P 61,959
(Cite as: 1977 WL 1551 (N.D.Cal.))

Page 1

C

United States District Court; N.D. California.

Citizens Utilities Co., et al.

v.

The American Telephone and Telegraph Co., et al.

Civil No. 39483-WJF

Filed April 1, 1977

FERGUSON, D. J.

Memorandum and Order

*1 Plaintiffs, pursuant to Federal Rule of Civil Procedure 59 have moved for reconsideration of the court's ruling dismissing this case. The court has once again reviewed the arguments of both parties, but upon careful consideration concludes that its original order and judgment must stand.

[Failure of Prosecution]

The court has discretion under Federal Rule of Civil Procedure 41(b) to dismiss for want of prosecution where the **totality** of the circumstances warrant such action. The failure to go to trial in March 1974, whether resulting from plaintiffs' decision to substitute counsel or from the court's calendar considerations is one of those circumstances. 16 years have passed since this action was instituted; the events at issue stretch back 25 or 30 years. Numerous witnesses have died; memories have faded. Actual prejudice, not merely presumed prejudice, has resulted. Here we do not have a single 16 year spell of inaction, but rather spaces throughout the course of the litigation where procrastination, for whatever reason, slowed proceedings. Plaintiffs have an obligation to press forward with litigation, even if defendants in part slow their progress. They failed to do that here.

[Antitrust Immunity]

Dismissal is also warranted on jurisdictional grounds. The court did not rule, as plaintiffs now suggest, that the telephone company defendants are protected from antitrust suits because of a blanket

immunity resulting from FCC regulation. Instead the court concluded that where the claim asserted by plaintiffs involves simply the division of revenues within the telephone industry, the proper forum is not in a district court, but in the FCC. *Cf., e.g., Montana-Dakota Co. v. Public Serv. Co.*, 341 U. S. 246 (1951). The doctrine of primary jurisdiction as applied in *Foremost International Tours v. Qantas Airways, Ltd.* [1975-2 TRADE CASES P 60,578], 525 F. 2d 281 (9th Cir. 1975), cert. denied - U. S. -, requires the same result. Whether these considerations be purely jurisdictional or whether they constitute a determination that the complaint fails to state a claim upon which relief may be granted, plaintiffs have now had an opportunity to present their argument on the matter and the court may dismiss the action on its own motion. See *Dodd v. Spokane County*, 393 F. 2d 330, 334 (9th Cir. 1968); 5 Wright & Miller, *Federal Practice and Procedure* § 1357.

It Is Ordered that plaintiffs' motion for reconsideration be and the same is hereby denied.

It Is Further Ordered that the clerk serve a copy of this order by mail upon the parties appearing in this action.

1977 WL 1551 (N.D.Cal.), 1978-1 Trade Cases P 61,959

END OF DOCUMENT

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